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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 238

DANIEL W. NORRIS, EMMET L. RICHARDSON, AND PERRY J. STEARNS, AS EXECUTORS OF THE WILL OF FANNIE W. NORRIS, DECEASED, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 154–165) is reported in 46 B. T. A. 705. The opinion of the Circuit Court of Appeals (R. 176–189) is reported in 134 F. 2d 796.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 8, 1943 (R. 189). The petition

for rehearing, filed April 23, 1943, was denied May 10, 1943 (R. 190). The petition for a writ of certiorari was filed August 6, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

By the terms of the decedent's will, the trustees were empowered in their discretion and option to pay out a part of the residuary estate to charitable organizations or to apply this part of the estate to noncharitable purposes. Pursuant to this power, the trustees made certain payments to charitable organizations. Were such payments deductible under Section 303 (a) (3) of the Revenue Act of 1926, as amended?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 15–17.

STATEMENT

The Board of Tax Appeals found the following facts (R. 155–160):

The decedent died testate on April 26, 1937 (R. 155).

The will of decedent provided *inter alia,* as follows (R. 155–159):

> *Item Eighteen.*—All the rest, residue and remainder of my estate, real, personal and

mixed, of whatsoever the same may consist, and wherever the same may be, I give, devise and bequeath unto my trustees hereinafter named, the surviver of them and their successors, in trust, to have and to hold the same during the continuance of the lives of—

my son, Daniel Wells Norris,
Francis D. Weeks,
Mabel F. LaCroix,
Helen Bradley and
Elizabeth Durham,

all of whom are named and identified in this will, and the survivors and survivors of them, and thirty (30) years after the death of such survivor.

I direct that my said trustees shall have entire control and management of the trust property committed to their care, invest and re-invest the same, change investments and sell, pledge and dispose of all such trust property as they, from time to time shall deem best, and collect all moneys, principal and income, that may be owing, and dispose of said principal and income as herein directed.

After deducting all taxes and expenses in the management of the trust funds, services of agents, attorneys and reasonable compensations to the trustees from the gross income of the trust property, I direct the trustees to use the net annual income thereof as follows, to-wit:

> I direct my said trustees to use annually for the comfort, welfare and happiness of each of the following named persons during the periods described, the annual sums designated in each case. I direct that my said Trustees and their successors shall have the power, from time to time, in their uncontrolled discretion, to reapportion such income among such beneficiaries as they deem best, increasing the amounts paid to some beneficiaries and decreasing the amounts paid to others to the extent of entirely excluding any beneficiary from the receipt of income for such time as said Trustees deem best, and the decision of my said Trustees adding to or subtracting from the amounts designated, shall be final and conclusive.

[Subparagraphs lettered "(A)" to "(Q)", both inclusive, in which decedent named various annuitants, are omitted.][1]

> (R) If and when said Trustees are satisfied that they shall have in their possession trust property more than sufficient to meet in full all the previous requirements of my will, then I direct said trustees to pay out of the principal of the trust property in their possession to Columbia Hospital of Milwaukee, Wisconsin, meaning the corporation by that name conducting a hospital near Milwaukee-Downer College, a sum not

[1] The text of these subparagraphs was omitted from the findings of the Board of Tax Appeals and the note within the brackets substituted (R. 156; 46 B. T. A. 705, 706).

exceeding Five Thousand (5,000) Dollars.

(S) After my trustees have paid to Columbia Hospital the sum of not exceeding Five Thousand (5,000) Dollars as set forth in Subdivision (R) of this Item, I authorize and empower them, whenever and as often as they are satisfied that they have in their hands ample funds to fulfill all the previous requirements of my said will, to appropriate and pay over such sums of money as they, in their discretion, may deem best, as additional bequests to such of the beneficiaries named in Items Fourteen, Fifteen and Eighteen, as they may from time to time determine.

(T) After my trustees have paid to Columbia Hospital the sum of not exceeding Five Thousand (5,000) Dollars as set forth above, I authorize and empower them whenever and as often as they are satisfied that they have in their hands ample funds to fulfill all the requirements of my said will, at their discretion and option, to pay to any worthy charitable, religious or educational corporation, association or enterprise, operating in the city of Milwaukee, Wisconsin, such sums of money out of the principal in their hands as they may deem best, with the suggestion which is not mandatory, that the enterprises which I have been interested in be given the preference.

(U) The trustees shall have absolute discretion as to the best manner of expending and using the several sums of money I have

hereinbefore authorized them to use for the comfort, support, welfare, and happiness of the several beneficiaries above named; and said trustees may, if they deem it best, pay directly to any one or more of said beneficiaries parts or all of said sums, provided however that none of said beneficiaries shall be entitled, as a matter of right, to receive his or her portion in cash, and shall have no right to assign or sell the same; and said trustees shall never be under any obligation to honor any such assignment or sale.

(V) The trustees may, if they deem it best, use enough of the principal of the trust property in their possession, in purchasing an annuity or annuities in any one or more first class life insurance companies doing business in the United States of America, for the benefit of any or more of the beneficiaries named in this Item Eighteen, whereby each such beneficiary for whom any annuity shall be purchased shall receive during the continuance of his or her life an annual sum equal to that which I have herein directed said trustees to use for his or her comfort, support, welfare and happiness. After the commencement of the payment to any such beneficiaries of such annuity, said trustees shall cease all further expenditures for the benefit of such beneficiary.

(W) If the net annual income of the trust property in the hands of my trustees shall in any year exceed the amount required to

be paid out for the comfort, support, welfare and happiness of the several annuitants named in this will, then I direct said trustees to pay the excess to my son, Daniel Wells Norris, or in their discretion, use such excess for the comfort, support, welfare and happiness of such of said annuitants as the trustees shall think most in need thereof.

If the net annual income shall in any year be insufficient to meet the requirements set forth in the said will, then I authorize said trustees to use so much of the principal of said trust property as they shall deem wise and best in order to provide for the comfort, support, welfare and happiness of such annuitants.

(X) Notwithstanding the fact that the annuities herein created are in terms expressed as continuing during the lives of the several annuitants respectively, it is my intention that they shall cease upon the expiration of the term of the trust as hereinbefore limited and I so direct. If any of the annuitants named in this Item be living at the expiration of the trust herein created by lapse of time, I direct my said trustees to expend so much of the principal as may be necessary to purchase an annuity or annuities in any one or more reputable life insurance companies doing business in the United States of America so that the annuity then being paid to such annuitant may be continued during the balance of his or

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her life, and the remainder of such trust funds then in their hands shall be disposed of as provided in and by the next following Subdivision (Y) of this Item Eighteen.

(Y) In case there shall still be in the possession of said trustees any of said trust property, after said trustees shall have provided for the satisfaction in full of all the foregoing provisions of this Item Eighteen, I direct said trustees to pay and transfer the same to my son Daniel Wells Norris, if he be then living; and if he be dead, then to his surviving issue, to take *per stirpes* and not *per capita;* and if there shall then be no such surviving issue, then to the heirs of Marcia Wells, my mother, to have and to hold unto the heirs of Marcia Wells, their heirs and assigns forever, which heirs I direct shall take *per stirpes* and not *per capita.*

On July 25, 1938, the decedent's trustees paid $5,000 from the principal of the trust property to the Columbia Hospital of Milwaukee, Wisconsin, a corporation conducting a hospital, and also transferred to the Norris Foundation property which had a fair market value of $284,341.10 on the date of decedent's death (R. 159).

The Columbia Hospital of Milwaukee and the Norris Foundation are corporations organized and operated exclusively for religious and charitable purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual. No substantial part of the activi-

ties of either corporation is devoted to carrying on propaganda or otherwise attempting to influence legislation. (R. 159.)

Prior to making the above mentioned payment of $5,000 the trustees determined, and were satisfied, that they had in their possession trust property more than sufficient to meet in full all the requirements of decedent's will which preceded Item Eighteen (R) thereof. After such payment was made, the trustees determined, and were satisfied, that there were in their possession ample funds to fulfill all requirements of the decedent's will, and, in the exercise of the option and discretion referred to in Item Eighteen (T), the trustees transferred the above mentioned properties to the Norris Foundation after determining that the foundation was a worthy charitable, religious, or educational corporation, association or enterprise, operating in Milwaukee, and an enterprise in which the decedent had been interested in her lifetime. (R. 159–160.)

The federal estate tax return for decedent's estate was filed on July 26, 1938. Deductions from gross estate for charitable, public, and similar gifts and bequests were claimed in such return, *inter alia,* as follows: (2) Columbia Hospital, $5,000; (3) Norris Foundation, $262,511.12. The Commissioner disallowed these deductions. (R. 160.) The Board of Tax Appeals sustained the Commissioner (R. 164–165), and the court below affirmed (R. 189).

ARGUMENT

Section 303 (a) (3) of the Revenue Act of 1926, as amended (Appendix, *infra*) provides for the deduction of charitable bequests in computing the value of the net estate for purposes of the federal estate tax. Article 47 of Treasury Regulations 80 (1937 ed.) (Appendix, *infra,* pp. 16–17), covers conditional bequests and provides that if the transfer is dependent upon the performance of some act or the happening of some event in order to become effective, it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed; also, that if the donee or trustee is empowered to divert the property or fund to a noncharitable purpose the deduction will not be allowed.[2]

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[2] Similar provisions have been contained in regulations promulgated under earlier estate-tax laws. See Article 56, Regulations 37 (1921 ed.); Article 50, Regulations 63 (1922 ed.); Article 47, Regulations 68 (1924 ed.); Article 47, Regulations 70 (1926 and 1929 eds.). The regulations have received judicial approval. *Humes* v. *United States*, 276 U. S. 487, 491. They have also received legislative approval through the reenactment of statutory provisions relating to the deduction of charitable bequests which though not identical in the various Revenue Acts have not differed in any way that affects the regulation. *Taft* v. *Commissioner*, 304 U. S. 351; *Magruder* v. *Washington, B. & A. Realty Corp.*, 316 U. S. 69. Section 81.46 of Regulations 105, promulgated under the Internal Revenue Code, departs somewhat from the language used in the first paragraph of Article 47 of

In the instant case, the trustees were empowered in certain circumstances to pay out of principal "a sum not exceeding" (R. 156) $5,000 to the Columbia Hospital and thereafter "at their discretion and option" (R. 157) to use excess funds for charitable or noncharitable purposes. We submit that the Commissioner, the Board of Tax Appeals, and the court below all correctly ruled that there was not sufficient certainty at the time of the decedent's death that the payments would ever be made to charity to justify the claimed deductions. The payments in question were absolute and mandatory for no more than the one cent which had to be paid to Columbia Hospital under the terms of the will (R. 189).[3] Under the terms of the will (Item 18, subparagraph S, *supra*, p. 5) the trustees could have paid the excess amounts as additional bequests to such of the beneficiaries named in Items Fourteen, Fifteen,

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Regulations 80 (1937 ed.), but in our view makes no change as applied to the instant facts.

The Revenue Act of 1942, c. 619, 56 Stat. 798 (Sec. 408) amended the law, effective as to estates of decedents dying after February 10, 1939, with respect to deductions for disclaimed legacies passing to charity, but as pointed out by the court below (R. 188–189) this amendment would not affect the instant case.

[3] The taxpayers contend (Pet. 4, 31) that by Wisconsin law, which governs the interpretation of the will, the transfers were mandatory. The court below after carefully reviewing the authorities (R. 185–189) concluded otherwise and we submit that in the light of the language of the will, above noted, such conclusion is unquestionably correct. Cf. also *Helvering* v. *Stuart*, 317 U. S. 154, 162–163.

and Eighteen as they might determine (R. 26, 157, 162). Items Fourteen and Fifteen (R. 20–23) contain numerous specific bequests to relatives, friends, and others. Item Eighteen (R. 23–28) contains provisions with respect to disposition of the residuary estate and, among other things, provides for many annuities payable by the trustees to various persons; in addition, subparagraph V (R. 27, 157–158) authorizes the trustees to use principal to purchase annuities and subparagraph Y (R. 28, 159) provides for ultimate distribution of surplus property to the decedent's son, if living.

In similar situations the courts have quite uniformly denied the claimed deductions (*Burdick* v. *Commissioner,* 117 F. 2d 972 (C. C. A. 2d), certiorari denied, 314 U. S. 631; *Mississippi Valley Trust Co.* v. *Commissioner,* 72 F. 2d 197 (C. C. A. 8th), certiorari denied, 293 U. S. 604; *Robbins* v. *Commissioner,* 111 F. 2d 828 (C. C. A. 1st)).

In support of their application for a writ of certiorari the taxpayers assert (Pet. 2) a conflict with *Brown* v. *Commissioner,* 50 F. 2d 842 (C. C. A. 3d); *Meierhof* v. *Higgins,* 129 F. 2d 1002 (C. C. A. 2d); and *Smith* v. *Commissioner,* 78 F. 2d 897 (C. C. A. 1st). We submit that no such conflict exists. In the *Brown* case the trustees were directed to distribute the funds as they might deem best, bearing in mind the ideals of the settlor, expressed by him from time to time. The

evidence showed that the settlor had in mind the erection of a church and that the trustees had all been consulted and had taken part in conferences with the decedent and church officials prior to the decedent's death. The church was erected after his death and the amount expended for that purpose was allowed as a deduction. It is true that in the *Brown* case the court said (p. 846), relying on Pennsylvania law not applicable herein, that the designation of the church related back to the decedent's death and the church took the gift from the settlor and not from the trustees. Apparently this language was used with the thought in mind that the trustees were carrying out to the best of their ability the positive command of the decedent, and was not intended to cover a situation like the instant one where the trustees were given power to use the funds at their discretion and option for either charitable or noncharitable purposes. The *Meierhof* case is also materially distinguishable from the instant one. There it was held that where a bequest of a contingent remainder to charity can be shown to have a substantial value, determined by use of actuarial tables, a deduction on account thereof should be permitted. That conclusion was based upon *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, where the Court held that the gift in question was not too remote to be valued, and certainly neither the *Ithaca Trust Co.* case nor the *Meierhof* case is at vari-

ance with the conclusion that there can be no completed gift to charity where the trustees have it within their power to make another disposition of the fund. In the *Smith* case there was a compromise of a contest of the decedent's will as a result of which certain payments were made to charity. In holding that these payments were deductible, the court took the view that under local law the compromise provisions were to be given the same significance as though they had been actually included in the will. In the instant case there was no compromise and under state law, as construed by the court below (R. 185–189) the trustees could make payments to charity or others at their option. Moreover, the *Smith* case was subsequently specifically overruled by the same court which decided it, *Robbins* v. *Commissioner, supra,* p. 832.

CONCLUSION

The decision is correct; there is no conflict; the petition should be denied.

Respectfully submitted.

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